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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 DIVISION PTB HON. WARREN R. DARROW **DEFENDANT JAMES ARTHUR RAY'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE VICTIM IMPACT TESTIMONY**

I. INTRODUCTION

The State intends to elicit testimony from victims' family members at the *guilt phase* of trial. Victim-impact testimony is generally prohibited at the guilt phase because of its obvious and powerful prejudicial effect on the defendant. *See, e.g.*, *Havard v. State*, 928 So. 2d 771, 792 (Miss. 2006) ("Victim impact evidence is admissible at sentencing, though not at the culpability phase of trial."); *White v. State*, 2003 Wyo. 163 (Wyo. 2003) (At the guilt phase, "[v]ictim impact testimony must not be permitted 'unless there is a clear justification of

relevance'" (quoting *Justice v. State,* 775 P.2d 1002, 1011 (Wyo.1989)). This limitation is rooted in the likelihood of serious prejudice to criminal defendants. As Supreme Court Justice John Paul Stevens has observed, "[v]ictim impact evidence is powerful in any form," and it "puts a heavy thumb on the prosecutor's side of the scale." *Kelly v. California*, 129 S.Ct. 564, 567, (2008) (statement of Stevens, J.). Indeed, the highest courts of Arizona and the nation have recognized that—even in death penalty cases where victim impact is relevant and admissible to prove aggravating circumstances—victim statements may be so prejudicial as to violate the Constitution's Due Process Clause. *See State v. Armstrong*, 218 Ariz. 451, 462 (2008); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

The need to exclude victim impact testimony is clear here, where the State seeks to introduce it at the guilt phase. It has *no* relevance to the charged crimes. The State asserts that the family representatives will "establish the victims' age, health, mental state, and the victims' relationship/history with Defendant, and that "[a]ll of these facts are relevant to identify each victim, complete the story, and to aid the jury in understanding why the victims remained in the sweat lodge." Response at 1: 20–22. This argument is specious. The State knows well that the victims' identity, health, and mental state are not in dispute in this case. In fact, the Defense has already agreed to the State's request to stipulate to the chain of custody regarding the decedents' bodies, such that identity is clearly not in question. Nor is the decedents' "relationship/history with Defendant" in issue, much as the State would like to make it otherwise. Moreover, all of these facts—although not material or in dispute—are easily established by any of the 36 sweat lodge participants the State intends to call, and by the victims' medical records. By calling the victims' distraught family members to testify to facts that are not at all in issue, the State makes a thinly veiled attempt to inflame the jurors' passions and appeal to their sympathies. Such an attempt must fail under the Constitution's Due Process Clause and Arizona Rule of Evidence 403.

II. ARGUMENT

A. Admitting testimony from the victims' families would threaten Mr. Ray's constitutional right to a fair trial.

"The Constitution places limits on victim statements: a statement violates due process if it is 'so unduly prejudicial that it renders the trial fundamentally unfair.'" *Armstrong*, 218 Ariz. at 462 (quoting *Payne*, 501 U.S. at 825). Indeed, as the United States Supreme Court cautioned in discussing victim-impact evidence, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. *Payne*, 501 U.S. at 825 (citing *Darden v. Wainwright*, 477 U.S. 168, 179–183 (1986)).

Those cautionary words apply here. There is no denying that testimony from the victims' families would be deeply prejudicial to Mr. Ray. As one federal judge has explained, victim impact testimony has "unsurpassed emotional power . . . on a jury." *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005), *quoted in Kelly*, 129 S.Ct. at 567.[1] *See also State v. Beaty*, 158 Ariz. 232, 244 (Ariz. 1988) (noting that "this type of information is inflammatory by its very nature"). Such prejudice will arise in this case even if the State characterizes the testimony not as a victim impact statement, but instead as a mechanism for the victims' family to "complete the story" for the jury. Response at 1:21. The families of Mr. Shore, Ms. Brown, and Ms. Neuman will understandably be distraught. In addition, some members of the victims' families have spoken out publicly against Mr. Ray. It is difficult to overstate the powerful effect that these family members' grief and anger would have on jurors. Permitting the victims' families to testify guarantees that the jury will consider impermissible evidence and raises a very real risk that members of the jury would reach a decision based on their sympathy for the victims and families rather than on the elements of the charged crimes. The Constitution prohibits courts from inviting such fundamental unfairness.

[1] *See also id.* ("It has now been over four months since I heard this testimony . . . and the juror's sobbing during the victim impact testimony still rings in my ears. This is true even though the federal prosecutors in [the case] used admirable restraint in terms of the scope, amount, and length of victim impact testimony.").

B. Testimony from victims' family members should be excluded under Arizona Rule of Evidence 403.

In addition, testimony from the victims' families must be excluded during the guilt phase of trial pursuant to Arizona Rule of Evidence 403. The prejudicial effect of the testimony the State purportedly plans to elicit from the victims' family members would far outweigh its probative value, because such testimony is simply not relevant to this case. The victims' identity, age, health, and relationship with Mr. Ray are not "material facts in issue." *See State v. Kennedy*, 122 Ariz. 22, 26 (App. 1979) ("Evidence is relevant if it has any basis in reason to prove a *material fact in issue*." (emphasis added)). A fact is not "in issue" simply because it is connected in some way with the victim's personal history. *Cf. State v. Smith*, 136 Ariz. 273, 276 (1983) (finding it "clear that [the witness's] testimony concerning the character of the deceased victim was irrelevant"). What *is* in issue is Mr. Ray's mental state and whether he caused the three deaths for which he is charged with reckless manslaughter. *Compare, e.g., Kennedy*, 136 Ariz. at 27 ("Appellant's intent was a material fact in issue."). The State's vague claim that this evidence somehow "completes the picture" adds nothing.

Moreover, to the extent that issues of identity, age, and health are material at all, every germane fact on these topics can be obtained from already-disclosed witnesses who attended the Spiritual Warrior retreat, from law enforcement witnesses, and from the decedents' medical records. Testimony from the victims' families would be cumulative and entirely unnecessary.

III. CONCLUSION

The State must not be permitted to transform this trial from an adjudication of the charged crimes into an emotional appeal to jurors' sympathies. The unnecessary testimony the State plans to elicit from the victims' family members would do just that. The testimony should be excluded.

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